IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

RSA No. 401 of 2007

Date of Decision : 5th November, 2007

Bhopal Singh …Appellant.

Versus

Smt. Rupi Devi and others …Respondents.

Coram:

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr. Romesh Verma, Advocate.

For the respondents. Mr. K.S Hetta, and
Mr. Jeevesh Sharma, Advocates

Sanjay Karol, J (Oral).

On behalf of the respondents power of attorney filed by Shri K.S.Hetta and Shri Jeevesh Sharma, Advocates, which is taken on record.

The present appeal arises out of judgement and decree dated 4.7.2007 passed by the District Judge (Forest), Shimla, H.P. in Civil Appeal No. 71-S/13 of 06/04 titled as Bhopal Singh vs. Roopi Devi, dismissing the appeal filed by the appellant herein and upholding the judgement and decree dated 6.10.2004 passed by Civil Judge (Jr. Division), Theog, Distt. Shimla in Civil Suit No. 59-1 of 2001 titled as Bhopal Singh vs. Roopi Devi.

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

The appellant, referred to as the plaintiff herein, filed a suit for permanent prohibitory injunction restraining the defendants from raising any kind of construction over the suit land bearing Khasra No. 437 situate in Chak Sainj, Tehsil Theog, Distt. Shimla. The plaintiff's case is that the defendants are his tenants over the shed constructed in Khasra No.430 and in the garb of the constructing the shed they are not only raising the excess construction but also encroaching the adjoining suit land.

The respondents, referred to as the defendants, resisted the suit on the ground that the suit land was not encroached upon by them and that they are the owners of the shed situated in Khasra No. 430 for the reasons that they have purchased the land and in the alternative have become the owners by way of adverse possession since the land is in their possession for the last 40 years.

The plea of the plaintiff was rejected by the trial Court and the suit was dismissed. It was specifically held that the defendants had not encroached upon the land who were also not the plaintiff's tenants. The defendants plea that they had purchased the suit land or had become owner by way of adverse possession was also negatived.

The plaintiff assailed the said decree by filing an appeal before the District Judge (Forest), Shimla, which was decided in terms of the impugned judgement and

decree dated 4.7.2007 which is now the subject matter of the appeal before this Court.

It is pertinent to mention that the plaintiff had also moved an application before the District Judge (Forest), Shimla under Order 41 Rule 27 CPC for placing on record the demarcation report, which the plaintiff had got carried out from the Revenue Authorities.

As is clear from the impugned judgement that this application was also dismissed for the reason that the demarcation file is destroyed after one year and the plaintiff had not filed the same before the trial Court. On merits, the appeal was dismissed and the defendants were not held to be the tenants.

In my view, the issue in controversy was as to whether the defendants had encroached upon the plaintiff's land and had carried out any construction there upon. The Ist appellate Court has not even touched this aspect of the matter. It has, therefore, seriously erred in not examining the matter and fully examining the jurisdiction vested in him while arriving at its conclusions. The matter needs to be remanded back on this count itself.

The plaintiff's application for leading additional evidence has been wrongly rejected. The orders rejecting the same is set aside. There is nothing on record to show that the record pertaining to the demarcation had been destroyed. This fact primarily weighed with the Ist appellate Court. In any event, it is a matter of trial and

the authorities who had carried out the demarcation could have proved by them.

On this ground, the present appeal is accepted and the judgement and decree dated 4.7.2007 is set aside. The appeal is restored to its original number. The District Judge (Forest) is directed to consider afresh plaintiff's application for leading additional evidence in accordance with law after hearing the parties.

Ld. Counsel for the appellant has pressed for the appointment of the Local Commissioner as the dispute pertains to the boundary of the land. For the reason that the matter is being remanded back, I am not considering the request of the learned counsel for the appellant, however, it would be open for the parties to approach the Court below who shall consider the same on its merits in accordance with law.

Any observation made herein shall not be construed as an opinion on the merits of the case. Application stands disposed of.

Ld. Counsel for the parties agreed that parties shall appear before the concerned Court on 27th November, 2007.

November 5, 2007 **(Sanjay Karol)**
(TM**)** **Judge.**